Supreme Court, U. S.
FILED
FEB 17 1978
MICHAEL RODAK, JR., CLERK

No. 77-714

In the Supreme Court of the United States

OCTOBER TERM, 1977

THEODORE G. DALEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 564 F.2d 645.

JURISDICTION

The judgment of the court of appeals (Pet. App. C) was entered on October 20, 1977, and the petition for a writ of certiorari was filed on November 18, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Hobbs Act, 18 U.S.C. 1951, applies only to "racketeering," and, if so, whether petitioner's extortionate conduct constitutes "racketeering."

2. Whether the evidence was sufficient to support the jury's verdict.

3. Whether the statements of co-conspirators were properly admitted into evidence.

4. Whether petitioner's mid-trial motion for recusal of the trial judge was properly denied.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of obstructing commerce by means of extortion, in violation of the Hobbs Act, 18 U.S.C. 1951, of conspiring to commit that offense, also in violation of Section 1951, and of five counts of accepting, as a union officer, goods and services from employers of union members, in violation of 29 U.S.C. 186(b)(1) and (d). Petitioner received a suspended sentence on all counts and was placed on probation for three years; he was fined $5,000 on each of the five counts charging violations of 29 U.S.C. 186 (Pet. App. 2a). The court of appeals affirmed (Pet. App. 1a–13a).

Since 1956 petitioner has been the Secretary-Treasurer, or principal officer, of Teamsters Local 445, a local of several thousand members covering several New York counties. Petitioner functioned as the "boss" of the Union and controlled the union hiring

procedures (Tr. 39, 47, 363–364, 411–412, 442, 526, 543, 832, 1034, 1529).

In the summer of 1971 petitioner asked unindicted co-conspirator Anthony Alecca, Jr., the second ranking officer in the Local, to obtain some stone to construct a driveway at petitioner's camp in Windham, New York (Tr. 37, 40, 73–74). Alecca contacted a representative of Hudson Cement in Kingston, New York, a company with which the union was then engaged in contract negotiations (Tr. 74–80, 438, 481). The general manager of Hudson Cement, after being advised that the stone was for petitioner's use, agreed to provide several loads in order to avoid any problems with Local 445 (Tr. 79–80, 439–440, 481–482, 487–489). Alecca then instructed Thomas Clausi, the Local 445 shop steward on a project to repair the New York State Thruway near Kingston, to arrange for trucks and drivers to haul the stone 60 miles from Hudson Cement in Kingston to petitioner's camp (Tr. 81–85, 198–200, 358, 712).

In all, 30 to 36 truckloads of stone totalling about 600 tons were delivered to petitioner's camp by union drivers between September 3 and 11, 1971. This stone was selling at a delivered price of nine dollars per ton at Windham, the site of petitioner's camp. Some ten to fifteen dump trucks, a tractor-trailer, and other equipment supplied by Local 445 owner-operators and contractors who employed union members were used to make the deliveries. The drivers who delivered the stone were not paid for their labor, the truck owners were not paid for the use of their equip-

ment or fuel, and Hudson Cement received no reimbursement for the stone it supplied (Pet. App. 4a).

Clausi testified that he was following orders in arranging for the stone deliveries and that he believed that if he or the other union members had refused to make the hauls, they would not have received work (Tr. 238–239, 312–313). Several owner-operators and drivers testified that they agreed to participate in the delivery so that they would not lose their employment (Tr. 238, 364, 410–412, 534–544, 568–569, 575, 781–784). Clausi threatened several drivers with loss of their jobs if they did not cooperate in the project, saying to one driver, for example, that "[y]ou will either go to the mountains or be looking for a new job" (Tr. 534–544, 781–784).

Petitioner also ordered Clausi to get him a quantity of 12-inch by 12-inch wooden beams (Tr. 87–88, 241). Clausi secured about 20 of the beams from a construction company, and they were delivered by an employee of Callanan Industries, the contractor on the New York Thruway project at Kingston (Tr. 241–246, 715–726). Later, petitioner told Alecca that he had spoken to Clausi about delivering still more beams to his camp and that he wanted to know why they had not been delivered (Tr. 87–88). Alecca and Clausi then contacted officials of Callanan Industries, who agreed to provide the beams to petitioner (Tr. 88–89, 246–249). Twenty-two additional beams—each worth about $35—were then delivered to petitioner's camp by a union driver on the Callanan payroll (Tr. 248–250, 621, 636).

ARGUMENT

1. Petitioner asserts (Pet. 21–26) that the proscriptions of the Hobbs Act apply only to "racketeering" and that his conduct does not constitute "racketeering." The question whether "racketeering" is an element of the Hobbs Act is presently before this Court in *United States* v. *Culbert,* No. 77–142, argued January 11, 1978.[1] However, even if this Court were to hold that the Hobbs Act is so limited, the outcome of this case should not be affected since no definition of "racketeering" in the context of the Act should exclude petitioner's extortionate conduct. Indeed, although the court of appeals in *Culbert* did not discuss the legislative history of the Act (548 F. 2d 1355 (C.A. 9)), it adopted the view of the Sixth Circuit in *United States* v. *Yokley,* 542 F. 2d 300, 303, which began from the premise that Congress's purpose in adopting the Hobbs Act was to curb "labor racketeering." As the court below observed (Pet. App. 10a):

> * * * the corrupt abuse of the power of a union official in our view is precisely the type of activity which the Act was designed to embrace, see, e.g., *United States* v. *Enmons,* 410 U.S. 396, 400 (1973); and cases cited in *United States* v. *Brecht,* [540 F. 2d 45, 51 (C.A. 2)], and indeed is a form of labor racketeering.

2. Petitioner also contends (Pet. 26–30) that the evidence was insufficient to support the jury's verdict

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[1] We are sending a copy of our brief in *Culbert* to petitioner's counsel.

because the necessary effect on interstate commerce was not established.[2]

In *Stirone* v. *United States,* 361 U.S. 212, 215, this Court observed that the broad language of the Hobbs Act—which proscribes extortion affecting commerce "in any way or degree"—manifests Congress's intention to use the full extent of its constitutional power to punish interference with interstate commerce by extortion, robbery, or physical violence. Against this background, the courts of appeals have consistently ruled that only a minimal effect on interstate commerce need be shown to meet the jurisdictional requirement of the Act. See *e.g., United States* v. *Hathaway,* 534 F. 2d 386 (C.A. 1), certiorari denied, 429 U.S. 819; *United States* v. *Mazzei,* 521 F. 2d 639 (C.A.

[2] Petitioner also urges (Pet. 30–31) that the evidence was insufficient to show that the goods and services provided by the victims of his scheme were obtained through the use of fear in violation of the Hobbs Act. The court of appeals correctly concluded (Pet. App. 9a):

"A reading of the record here reveals testimony by both employees and employers of Local 445 that they would lose their jobs or that their business would be injured if they failed to comply with Daley's requests transmitted through his agents and the named but unindicted co-conspirators, Alecca and Clausi. Daley was the principal officer of the Local for fifteen years and there was evidence of his power to influence adversely the economic interests of both union members and employers. The materials involved here were substantial and were provided at considerable expense of time, effort and money by the victims of Daley's extortion. While there was testimony by some that they complied willingly with Daley's demands, their credibility was a matter for the jury to determine. We have no difficulty in finding that there was sufficient evidence to justify a finding that there were victims who complied with Daley's demands out of a reasonable fear of retaliation if they failed to do so."

3), certiorari denied, 423 U.S. 1014; *United States* v. *DeMet,* 486 F. 2d 816, 822 (C.A. 7), certiorari denied, 416 U.S. 969.

There was ample evidence to meet this statutory requirement. Some of the victims of petitioner's scheme of extortion here were contractors for repairs on the New York Thruway, a major artery of interstate commerce, and employees of these contractors; their compliance was obtained by threats that they would lose their work on that project. Moreover, Hudson Cement and Callanan Industries, two of the principal victims of petitioner's scheme, were engaged in ongoing interstate commerce: Hudson made regular out of state shipments of cement, and Callanan was engaged in major construction work on the New York Thruway.[3] Since the materials involved here were of substantial worth, the resources of both companies were measurably depleted by the extortion, and the resulting impairment of their ability to carry on business in interstate commerce also brings petitioner's offense within the ambit of the Hobbs Act.

3. Petitioner next contends (Pet. 31–35) that his conspiracy conviction should be reversed because the trial court admitted into evidence the out-of-court statements of unindicted co-conspirators Alecca and

[3] Petitioner's reliance on *United States* v. *Merolla,* 523 F. 2d 51 (C.A. 2), is misplaced. As the court below noted (Pet. App. 8a n. 4) the victim in *Merolla* was not engaged in an ongoing business in interstate commerce, but rather entered into a "one shot deal" to build an auto showroom for the defendant. In any event, any possible intracircuit conflict on this issue is a matter for resolution by the court of appeals. See *Wisniewski* v. *United States,* 353 U.S. 901.

Clausi. Although petitioner does not single out specific statements that he contends were inadmissible, he is apparently referring to statements Clausi and Alecca allegedly made to various contractors and truckers, about which those persons testified at trial (see Pet. 31).

This argument is totally without merit. As the court of appeals correctly concluded, there was ample independent evidence to establish the conspiracy and Daley's participation, and we rely upon its discussion of this evidence (Pet. App. 12a).[4] Moreover, we observe that many, if not all, of the statements to which petitioner apparently refers were not hearsay. The statements of witnesses who testified to threats

[4] Petitioner suggests (Pet. 33) that this Court should review this aspect of the court of appeals' holding because there is a conflict among the circuits regarding the quantum of non-hearsay evidence that must be introduced before the government may invoke the co-conspirator exception to the hearsay rule. We agree that there is a conflict. Compare *United States* v. *Stanchich*, 550 F. 2d 1294, 1298 (C.A. 2) (a "fair preponderance of the [independent] evidence"); with *United States* v. *Oliva*, 497 F. 2d 130, 132 (C.A. 5) ("*Prima facie* case"); see also *United States* v. *Petrozziello*, 548 F. 2d 20, 23 (C.A. 1) ("if it is more likely than not"); cf. *United States* v. *Nixon*, 418 U.S. 683, 701 n. 14 (enough "substantial, independent evidence of the conspiracy" to take the case to the jury) (dictum). Since the non-hearsay evidence here was more than sufficient to invoke the co-conspirator exception under any of these tests, this case is not an appropriate vehicle to resolve the conflict regarding the requisite quantum of non-hearsay evidence.

Petitioner also suggests (Pet. 34–35) that even if the evidence of the co-conspirators' statements was admissable, the submission of the conspiracy count to the jury was improper. As the court of appeals correctly concluded (Pet. App. 12a), this contention is without merit, since there was ample evidence from which the jury could find guilt established beyond a reasonable doubt.

made by Clausi and Alecca were introduced not to show the truth of the matters allegedly asserted by Clausi and Alecca (see Fed. R. Evid. 801(c)), but simply to show that such threatening statements were made. Moreover, both Clausi and Alecca testified and were available for cross-examination.

4. Finally, petitioner contends (Pet. 35–40) that the trial judge erred in refusing to recuse himself. Petitioner moved for recusal on the tenth day of trial, approximately seven months after the case had been assigned to Judge Lasker (Pet. App. 10a). The request was based on the fact that Judge Lasker had presided in a civil proceeding involving Local 445 seven years previously. In connection with that prior case the court had stated that he did not believe that the statements of the various witnesses could be reconciled without "'finding somebody is perjuring himself'" (Tr. 1092). Petitioner and Raymond Ebert had been the only witnesses for Local 445 in that proceeding, and petitioner argued that the court must have resolved the credibility issue against one or both of them, since the court ruled in favor of the employer (Tr. 1092–1093). Both petitioner and Ebert were defense witnesses in the instant proceeding.

The trial judge declined to recuse himself, observing that even after defense counsel brought the matter to his attention he had only a "very vague recollection" of the earlier case (Tr. 1090–1091). He concluded (Tr. 1097) that because "so much time and energy had been invested in the case," he would not recuse himself "unless [he] believe[d] at any time

that a decision which I will be called upon to make could be influenced by my still foggy recollection of what occurred five or six or seven years ago * * *." He also assured the parties that if he believed the decision of whether the case should be submitted to the jury depended "to * * * any substantial extent" on his estimate of the credibility of either Daley or Ebert he would advise them so that they could reopen the question of recusal (*ibid.*).

A federal judge is required to disqualify himself in cases of "personal bias or prejudice," 28 U.S.C. 144, and in any case in which "his impartiality might reasonably be questioned" or in which he has a "personal bias or prejudice concerning a party." 28 U.S.C. (Supp. V) 455(a), (b)(1). As the court of appeals correctly concluded (Pet. App. 10a–11a), since petitioner does not allege that the trial judge conducted "*either* trial in a manner which even faintly suggested bias on his part," but only that seven years previously the judge had ruled adversely to the party on whose behalf petitioner had testified, the trial judge properly denied the recusal motion. *Wolfson* v. *Palmieri,* 396 F. 2d 121 (C.A. 2); see *United States* v. *Cowden,* 545 F. 2d 257, 265 (C.A. 1), certiorari denied, 430 U.S. 909. Indeed, it has long been settled that a disqualifying bias under these statutes ordinarily "must stem from an extrajudicial source" and not from the fact that a judge presided at a related case or acquired information in his judicial capacity. See *United States* v. *Grinnell Corp.,* 384 U.S. 563, 583; *Berger* v. *United States,* 255 U.S. 22, 31; *United States* v. *Haldeman,* 559 F. 2d 31, 131–139 (C.A. D.C.),

certiorari denied *sub nom. Ehrlichman* v. *United States,* 431 U.S. 933; *United States* v. *Partin,* 552 F. 2d 621, 636–639 (C.A. 5), certiorari denied, October 17, 1977 (No. 77-34).[5] In the circumstances here, particularly in view of the fact that petitioner relayed until the tenth day of trial before requesting recusal (Pet. App. 10a),[6] the trial court properly denied his motion.[7]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1978.

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[5] Section 455 was amended and broadened in 1974. The amended statute, like its predecessor, is aimed at "bias" stemming from "an extrajudicial source." See *United States* v. *Wolfson,* 558 F. 2d 59, 62 (C.A. 2); *Davis* v. *Board of School Commissioners,* 517 F. 2d 1044, 1051–1052 (C.A. 5), certiorari denied, 425 U.S. 944.

[6] As the court below observed, petitioner's protestations that defense counsel were unaware of his previous involvement with the trial judge "are unconvincing since the facts were clearly known to [petitioner] himself and, as a matter of public record, were at all times ascertainable by counsel" (Pet. App. 11a). See *Satterfield* v. *Edenton-Chowan Board of Education,* 530 F. 2d 567, 574 (C.A. 4); *Hirschkop* v. *Virginia State Bar Association,* 406 F. Supp. 721, 724 (E.D. Va.).

[7] Contrary to petitioner's claim (Pet. 40), 28 U.S.C. 144 does not require the trial judge to refer a recusal application to another district judge to pass on its legal sufficiency. See, *e.g.*, *Berger* v. *United States, supra,* 255 U.S. at 36; *United States* v. *Haldeman, supra,* 559 F. 2d at 131.

U.S. GOVERNMENT PRINTING OFFICE: 1978